

55. Appendix E, attached hereto, sets forth filing instructions explaining the specific information telecommunications carriers should include in their section 109(b) petitions. Appendix E reflects the proposal in the *Notice*, consideration of the record in this proceeding, and our further analysis herein of the statute's requirements.

56. Some small telecommunications carriers have urged us to allow telecommunications carriers filing section 109(b)(1) petitions to pool their applications under one general application petition and, as a result, more efficiently present common arguments and save the costs of submitting individual petitions, each of which would be assessed the \$5200 filing fee. We conclude that this is inappropriate given the requirements imposed by section 109(b)(1).¹²⁴ Section 109(b)(1) requires a detailed presentation of evidence that section 103 compliance is not reasonably achievable. Petitioners are required to submit evidence that demonstrates this in connection with precisely identified services, equipment, and facilities. These will differ from carrier to carrier. Additionally, petitioners are required to identify cost and financial resources information that is detailed and highly telecommunications carrier-specific. Even if we were to accept jointly pooled section 109(b)(1) petitions, we would, by operation of the statute, need to separate each separate telecommunications carrier petition for individual assessment. This individual assessment will impose predictable costs.

3. Confidential Treatment of Section 107(c)(1) and Section 109(b)(1) Petitions

57. In addition to highly sensitive cost and financial resources information, section 107(c)(1) and section 109(b)(1) petitions are likely to contain specific information regarding the inability of telecommunications equipment, facilities, and services to comply with CALEA standards. The facts underlying discrete section 107(c) and section 109(b) adjudicatory proceedings could also involve highly sensitive information about LEA activities. We therefore believe that section 107(c) and section 109(b) filings would be entitled to confidential treatment under the Freedom of Information Act (FOIA) and the Commission's rules.¹²⁵ Accordingly, we direct petitioners to file their petitions under a general claim of confidential or proprietary protection, subject only to scrutiny by the Commission and the Attorney General who is consulted in section 107(c) adjudications and is a party to all section 109(b)

¹²⁴ See DOJ Reply Comments at 43 n.164.

¹²⁵ Specifically, we believe that this information could be withheld from public disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4), which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." FOIA Exemption 4 also has been construed to protect information obtained by the government that could impair the effectiveness of a government program such as CALEA. See, e.g., *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (noting that Exemption 4 "protects a governmental interest in administrative efficiency and effectiveness"); *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 n.17 (D.C. Cir. 1974) (noting that other governmental interests may be embodied in this exemption). The Commission applied this rationale in the outage reports proceeding, specifically finding that it was obliged under Exemption 4 to consider any adverse impact that disclosure might have on government programs. See *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, 19 FCC Rcd 16830, 16855 (2004). We also believe that this information could be withheld from disclosure under FOIA Exemption 7(F), 5 U.S.C. § 552(b)(7)(F), which protects records compiled for law enforcement purposes that "could reasonably be expected to endanger the life or physical safety of any individual." See 47 C.F.R. § 0.457; see also *Living Rivers, Inc. v. United States Bureau of Reclamation*, 272 F.Supp.2d 1313, 1321 (D. Utah 2003) (allowing information about inundation dams to be withheld under FOIA Exemption 7(F) as sensitive, homeland security information "that could prove deadly if obtained by those seeking to do harm to the public on a large scale").

adjudications.¹²⁶ Petitioning telecommunications carriers are not required to request separately confidential treatment for the information submitted in their petitions.¹²⁷ However, petitioners must mark the top of each page of their petitions: "Confidential – Not for Public Inspection." We further conclude that, pursuant to section 0.457(g) of the Commission's rules, the information provided by telecommunications carriers in these CALEA proceedings will not be made routinely available for public inspection.¹²⁸ No commenter disagrees with this approach.

4. Monitoring Reports

58. In its Petition, Law Enforcement requested that the Commission impose a new compliance regime consisting of standardized CALEA compliance benchmarks for packet technologies. Under this proposal, limited compliance extensions generally would be granted only if providers of services that use packet technologies agreed to meet the proposed benchmarks.¹²⁹ Most LEAs supported this proposal; nearly everyone else opposed it as exceeding or contravening the explicit terms of the statute. We decline at this time to adopt the Law Enforcement benchmark proposal. As we stated in the *Notice*, we conclude that the interpretation of CALEA that we adopt in this *Second Report and Order*, particularly of CALEA sections 107(c) and 109(b), will better promote law enforcement's stated objective that all telecommunications carriers should become compliant with CALEA requirements as soon as possible.¹³⁰

59. Nevertheless, we share Law Enforcement's general concern that telecommunications carriers timely comply with CALEA for packet technologies. In the past, telecommunications carriers' progress in complying with CALEA for packet technologies was effectively monitored in two ways: by the FBI when it administered a Flexible Deployment program for packet technology, and by the Commission in administering section 107(c) extension petitions. The FBI's Flexible Deployment program no longer applies to packet technology and, as a consequence of our decision here, few telecommunications carriers will be able to seek extensions under section 107(c). With information from these programs no longer available, the Commission will have difficulty identifying, with sufficient forewarning, impediments to timely compliance and will have little opportunity to assist the industry, as appropriate, in achieving timely compliance. We thus conclude that all telecommunications carriers providing facilities-based broadband Internet access or interconnected VoIP services shall file a monitoring report with the Commission which will help the Commission ensure that providers of services that use packet technologies become CALEA compliant expeditiously. Specifically, with respect to facilities-based broadband Internet access providers and interconnected VoIP providers, we believe that a monitoring report will better ensure that they are able to meet the May 14, 2007 CALEA compliance deadline. A sample monitoring report (Form XXX) is provided in attached Appendix G to this *Second Report and Order*. These monitoring reports are separate and distinct from any section 107(c) or section

¹²⁶ CALEA sections 107(c), 109(b)(1); 47 U.S.C. §§ 1006(c), 1008(b)(1).

¹²⁷ 47 C.F.R. § 0.459(a).

¹²⁸ 47 C.F.R. § 0.457(g). Note, however, that the Commission will entertain requests under section 0.461 of its rules for permission to inspect these records, but would grant such request only in the event the requester is able to meet the requirements of section 0.461. 47 C.F.R. § 0.461. See generally, *Treatment of Confidential Information Submitted to the Commission, Report and Order*, 13 FCC Rcd 24816 (1998).

¹²⁹ *Petition* at 34-53.

¹³⁰ *Notice*, 19 FCC Rcd at 15721-22, para. 91.

109 filings that a telecommunications carrier may choose to make, and will not be considered substitutes for seeking relief under those provisions.

60. Accordingly, we specify the following procedure for these monitoring reports. Once OMB approves the new paperwork collection requirements of this *Second Report and Order*, we will issue a public notice setting forth a deadline that will require that providers of all such services to submit to the Commission a completed Form XXX, briefly describing the status of its compliance for each service based on packet technology, *e.g.*, whether the service already complies, whether the telecommunications carrier will comply with an identified industry standard or develop an ad hoc solution, the steps the telecommunications carrier is undertaking to achieve CALEA compliance, any problems with manufacturer support or network installation, and the date compliance is anticipated. Completed Forms XXX will not be made available to the public. We will, however, share completed Forms XXX with DOJ/FBI so that they may evaluate the progress each provider of a service that uses packet technology is making to achieve CALEA compliance. Where necessary, we may request additional information from a provider regarding its efforts to become CALEA compliant by May 14, 2007 deadline.

61. We find that the above procedure will promote expeditious CALEA compliance by providers of services that use packet technologies, but whose services are not yet CALEA compliant. We recognize that this procedure will impose an increased administrative burden on such providers, but anticipate that this burden will be minimal. To minimize the burden, we have developed a relatively short reporting form.

5. Disposition of Pending Section 107(c)(1) Petitions

62. As discussed above, we conclude that section 107(c) extension relief is not available for applications that include equipment, facilities and services installed or deployed on or after October 25, 1998. Accordingly, once OMB approves the new paperwork collection requirements of this *Second Report and Order*, we will issue a Public Notice setting forth a deadline by which any telecommunications carrier that has a section 107(c) petition on file with us shall file a letter that attests that its pending petition exclusively concerns equipment, facilities and services installed or deployed before October 25, 1998.¹³¹ The Commission will thereafter dismiss all non-conforming petitions and petitions for which clarifying letters have not been received.

C. ENFORCEMENT OF CALEA

63. In the *Notice*, we considered whether, in addition to the enforcement remedies through the courts available to LEAs under section 108 of CALEA, we may take separate enforcement action against telecommunications carriers, manufacturers and providers of telecommunications support services that fail to comply with CALEA. We stated that we appear to have broad authority under section 229(a) of the Communications Act to promulgate and enforce CALEA rules against both

¹³¹ Telecommunications carriers and others may also file amended section 107(c) petitions *so long as such petitions exclusively seek extensions for equipment, facilities and services installed or deployed before October 25, 1998*. A petitioner filing an amended section 107(c) petitions should clearly declare on the face of the petition that the petition has been filed in response to the Commission's action in the *Second Report and Order and Memorandum Opinion and Order* in ET Docket No. 04-295 and that it solely concerns equipment, facilities and services installed or deployed before October 25, 1998, along with that information set out and described in Appendix F, *infra*.

common carriers and non-common carriers, and sought comment on this analysis. We also sought comment on whether sections 108 and/or 201 of CALEA impose any limitations on the nature of the remedy that we may impose (e.g. injunctive relief) and whether section 106 of CALEA imposes any limitations on our enforcement authority over manufacturers and support service providers.¹³²

64. Additionally, we sought comment in the *Notice* on how we would enforce the assistance capability requirements under section 103 of CALEA. To facilitate enforcement, we tentatively concluded that, at a minimum, we should adopt the requirements of section 103 as Commission rules. We asked whether, given this tentative conclusion, the lack of Commission-established technical requirements or standards under CALEA section 107(b) for a particular technology would affect our authority to enforce section 103. Further, we asked whether there are other provisions of CALEA, such as section 107(a)'s safe harbor provisions, that the Commission should adopt as rules in order to effectively enforce the statute.¹³³ Moreover, we stated in the *Notice* that we believed it to be in the public interest for covered carriers to become CALEA compliant as expeditiously as possible and recognized the importance of effective enforcement of our rules affecting such compliance. We sought comment on whether our general enforcement procedures are sufficient for purposes of CALEA enforcement or whether we should implement some special procedures for purposes of CALEA enforcement. We also sought comment on any other measures we should take into consideration in deciding how best to enforce CALEA requirements.

65. *Discussion.* DOJ strongly supports the Commission enforcing the CALEA rules under section 229(a) of the Communications Act. DOJ contends that the telecommunications industry has in many instances failed to cooperate with LEAs and has delayed establishing CALEA standards and implementing new wiretapping technologies.¹³⁴ However, industry commenters contend that CALEA enforcement authority lies exclusively with the courts under CALEA section 108.¹³⁵

66. We find that we have the authority under section 229(a) to enforce CALEA, as that section gives us authority to "prescribe such rules as are necessary to implement the requirements of the Communications Assistance for Law Enforcement Act."¹³⁶ As we observed in the *Notice*, section 229(a) provides broad authority for the Commission to adopt rules to implement CALEA and, unlike section 229(b) does not limit our rulemaking authority to common carriers.¹³⁷ While the "penalties" provision of section 229(d) refers to CALEA violations "by the carrier," section 229(d) does not limit the Commission's general enforcement authority under the Communications Act.¹³⁸ We thus conclude that

¹³² *Notice*, 19 FCC Rcd at 15732-33, para. 114. Section 106 requires a manufacturer of telecommunications transmission or switching equipment and a provider of telecommunications support services to make available, on a reasonably timely basis and at a reasonable charge, to a carrier that uses its equipment, facilities or services the features or modifications as necessary to allow the carrier to comply with the assistance capability requirements of Section 103 and the capacity requirements of Section 104. 47 U.S.C. § 1005(b).

¹³³ *Notice*, 19 FCC Rcd at 15733, para. 115.

¹³⁴ DOJ Comments at 80-81; DOJ Reply Comments at 48-50.

¹³⁵ BellSouth Comments at 38; CTIA Comments at 10; Motorola Comments at 20; Nextel Comments at 11; SBC Comments at 24-25; T-Mobile Comments at 26; TIA Comments at 4; US ISPA Comments at 41.

¹³⁶ 47 U.S.C. § 229(a).

¹³⁷ 47 U.S.C. § 229(b).

¹³⁸ Section 229(d) provides:

Footnote continued on the next page.

the Commission has general authority under the Communications Act to promulgate and enforce CALEA rules against carriers as well as non-common carriers. We also conclude that section 106 of CALEA does not limit our authority to promulgate and enforce CALEA rules against manufacturers and support service providers. Accordingly, we find that, contrary to commenters who argued that authority to enforce CALEA lies exclusively with the courts under CALEA section 108,¹³⁹ we have the authority to prescribe CALEA rules and investigate the compliance of those carriers and providers subject to such rules. Additionally, under the Communications Act, the Commission has broad authority to enforce its rules. It can, for example, issue monetary forfeitures and cease and desist orders against common carriers and non-common carriers alike for violations of Commission rules.¹⁴⁰

67. We also conclude that sections 108 and 201 of CALEA do not limit the nature of the remedy that the Commission may impose.¹⁴¹ Whereas court actions under sections 108 and 201 would typically follow a failed attempt by a carrier to comply with an electronic surveillance order, the Commission may pursue enforcement actions against any carrier for failure to ensure that its equipment, facilities or services are capable of providing the assistance capability requirements prior to receiving an electronic surveillance request. Thus, the Commission's enforcement authority is complementary to, not duplicative of, the authority granted LEAs under sections 108 and 201.

68. We observe that the Commission's rules already include various CALEA requirements that we may enforce, including system security and records management requirements for all carriers subject to CALEA and assistance capability requirements for wireline, cellular and PCS carriers.¹⁴² Our existing rules for wireline, cellular and PCS carriers already state that these carriers are to comply with the assistance capability requirements in section 103; however, we have not previously codified this requirement for other carriers subject to CALEA. We thus adopt our tentative conclusion to codify this statutory requirement and thereby clarify that all carriers subject to CALEA are to comply, at a minimum, with the assistance capability requirements of section 103.¹⁴³ This action will facilitate the Commission's enforcement of CALEA. We recognize that, in the absence of Commission action to

For purposes of this Act, a violation by an officer or employee of any policy or procedure adopted by a common carrier pursuant to subsection (b), or of a rule prescribed by the Commission pursuant to subsection (a), shall be considered to be a violation by the carrier of a rule prescribed by the Commission pursuant to this Act.

47 U.S.C. § 229(d).

¹³⁹ 47 U.S.C. § 1007.

¹⁴⁰ *See, e.g.*, 47 U.S.C. §§ 312(b), 503(b). We conclude that, at this time, we will not adopt any special procedures to enforce CALEA and instead will rely on the complaint and investigation procedures already in our rules.

¹⁴¹ 18 U.S.C. § 2522(a) (where a court issuing a surveillance order finds that a telecommunications carrier, manufacturer, or support services provider has failed to comply with CALEA, the court may direct such entity to comply); 18 U.S.C. § 2522(b) (the Attorney General may, in a civil action in the United States district court, obtain an order in accordance with section 108 of CALEA, directing that a telecommunications carrier, manufacturer, or support services provider comply with CALEA); 18 U.S.C. § 2522(c) (authorizing a court to impose a civil penalty of up to \$10,000 per day against a telecommunications carrier, manufacturer, or support services provider for each day in violation after the issuance of a court order requiring compliance).

¹⁴² *See, e.g.*, 47 C.F.R. §§ 22.1100-22.1103; 24.900-24.903; 64.2200-64.2203.

¹⁴³ We are codifying our rules for all carriers subject to CALEA in new Subpart Z of Part 1 of our rules. In doing so, we consolidate existing CALEA rules into this Subpart. *See* paras 81-82, *infra*.

*specify more precise requirements in response to a section 107 (b) deficiency petition, as we did previously regarding J-STD-025, our rule sets forth a minimum requirement that carriers, manufacturers and support service providers may satisfy in various ways (e.g., implementing an industry standard, ad hoc or interim solution).*¹⁴⁴ Nonetheless, this does not diminish our resolve to consider carefully a *bona fide* complaint that a carrier, manufacturers or support service provider has not provided the necessary assistance capabilities and to take appropriate enforcement action.

D. COST RECOVERY ISSUES

69. In the *Notice*, the Commission sought comment on a number of issues related to the recovery of CALEA compliance costs, including the nature of such costs and from which parties the costs could be recovered.¹⁴⁵ The Commission also inquired into CALEA cost recovery pursuant to intercept statutes.¹⁴⁶ The Commission further sought comment on whether specific cost recovery rules should be adopted to help ensure that small and rural carriers can become CALEA-compliant.¹⁴⁷ Acting pursuant to section 229(e)(3) of the Communications Act, the Commission also referred to the Federal-State Joint Board on Jurisdictional Separations (Joint Board) the following question: whether CALEA compliance costs should be separated between intrastate and interstate jurisdictions, and, if so, how the associated costs and revenues should be allocated.¹⁴⁸ Because of the importance of the issues, the Commission asked the Joint Board to issue recommendations within a year of the release of the *Notice*, by August 9, 2005.¹⁴⁹ The Joint Board, however, has not yet issued its recommendation.

70. In the *Notice*, the Commission tentatively concluded that carriers bear responsibility for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities.¹⁵⁰ We affirm this tentative conclusion. Cost recovery from the federal government under CALEA section 109 turns on whether equipment and facilities were deployed before or after January 1, 1995.¹⁵¹ CALEA section 109 placed financial responsibility on the federal government for CALEA implementation costs related to equipment deployed *on or before* January 1, 1995.¹⁵² If the federal government refused to pay for such modifications, a carrier's pre-1995 deployed equipment and facilities are considered CALEA compliant until such equipment or facility "is replaced or significantly upgraded or otherwise undergoes major modification" for purposes of normal business operations.¹⁵³ On the other hand, for CALEA

¹⁴⁴ The absence of technical requirements or standards for implementing the assistance capability requirements of section 103 does not relieve a carrier, manufacturer, or support services provider of its CALEA obligations. 47 U.S.C. § 107(a)(3).

¹⁴⁵ *Notice*, 19 FCC Rcd at 15734-42, paras. 117-39.

¹⁴⁶ *Id.* at 15739-40, paras. 132-33.

¹⁴⁷ *Id.* at 15739, para. 131.

¹⁴⁸ *Id.* at 15741, para. 138.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 15737, para. 125.

¹⁵¹ Compare 47 U.S.C. § 1008(a), (d) with § 1008(b).

¹⁵² Section 109(a), (d) of CALEA, 47 U.S.C. § 1008(a), (d).

¹⁵³ Section 109(d) of CALEA, 47 U.S.C. § 1008(d). See also CALEA section 108(c)(3), 47 U.S.C. § 1007(c)(3) (no court may issue a CALEA enforcement order requiring a carrier to make modifications to pre-1995 equipment or facilities unless the federal government has agreed to pay for any such modifications).

implementation costs associated with equipment deployed *after* January 1, 1995, CALEA section 109 places financial responsibility on the telecommunications carriers unless the Commission determines compliance is not “reasonably achievable.”¹⁵⁴ Only in that event may the Attorney General agree to pay carriers the “additional reasonable costs of making compliance . . . reasonably achievable.”¹⁵⁵ Based on CALEA’s clear delineation of responsibility for compliance costs, we conclude that carriers bear responsibility for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities, absent a finding that compliance is not reasonably achievable pursuant to CALEA section 109(b).¹⁵⁶

71. In the *Notice*, the Commission acknowledged its prior statement regarding the ability of carriers to recover a portion of their CALEA capital costs through electronic surveillance order charges imposed on LEAs, and that this statement was made without the benefit of a complete and full record on the issue.¹⁵⁷ The Commission made this observation as one of several aspects that mitigated the cost burden on carriers of implementing four CALEA punch list items.¹⁵⁸ However, because we now conclude that CALEA section 109 provides the *exclusive* mechanism by which carriers may recover from law enforcement capital costs associated with meeting the capability requirements of CALEA section 103,¹⁵⁹ the Commission’s prior statement was incorrect to the extent it suggested that carriers may recover CALEA capital costs through intercept charges. As discussed above, CALEA specifically addresses the allocation of responsibility for compliance costs. CALEA section 109 makes the federal government responsible for compliance costs for the period on or before January 1, 1995, and places the responsibility for compliance costs after January 1, 1995 on carriers, absent a finding that compliance is not reasonably achievable pursuant to CALEA section 109(b).¹⁶⁰ Allowing carriers to recover CALEA compliance costs from the government through other means, such as through intercept charges, would be inconsistent with the cost recovery methodology set forth in CALEA section 109 because it would disrupt the cost burden balance between law enforcement and carriers carefully crafted by Congress in enacting CALEA. In short, as DOJ notes, it “would essentially allow carriers to do an ‘end-run’ around the provisions of section 109(b) and Congressional intent.”¹⁶¹ We therefore conclude that, while carriers possess the authority to recover through intercept charges the costs associated with carrying out an intercept that is accomplished using a CALEA-based intercept solution,¹⁶² they are prohibited by CALEA

¹⁵⁴ Section 109(b)(1) of CALEA, 47 U.S.C. § 1008(b)(1).

¹⁵⁵ Section 109(b)(2)(A) of CALEA, 47 U.S.C. § 1008(b)(2)(A).

¹⁵⁶ 47 U.S.C. § 1008(b). Commenters opposing this conclusion, *see, e.g.*, CTIA Comments at 13-14; Nextel Comments at 4; RTG Comments at 8; SBC Comments at 27-28, provide no convincing arguments to overcome the clear bifurcation of cost responsibilities set forth in CALEA section 109.

¹⁵⁷ *Notice*, 19 FCC Rcd at 15739, para. 132 (citing *Order on Remand*, 17 FCC Rcd at 6917, para. 60).

¹⁵⁸ *Id.*

¹⁵⁹ “Except as provided in subsections . . . 109(b) . . . , a telecommunications carrier shall ensure that its equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications are capable of [providing the capabilities required by CALEA].” CALEA section 103(a), 47 U.S.C. § 1002(a).

¹⁶⁰ 47 U.S.C. § 1008.

¹⁶¹ DOJ Reply Comments at 66.

¹⁶² *See, e.g.*, 18 U.S.C. § 2518(4).

from recovering through intercept charges the costs of making modifications to equipment, facilities, or services pursuant to the assistance capability requirements of CALEA section 103 and the costs of developing, installing, and deploying CALEA-based intercept solutions that comply with the assistance capability requirements of CALEA section 103.¹⁶³

72. To the extent carriers do not meet the necessary criteria for obtaining cost recovery pursuant to section 109(b) of CALEA,¹⁶⁴ carriers may absorb the costs of CALEA compliance as a necessary cost of doing business, or, where appropriate, recover some portion of their CALEA section 103 implementation costs from their subscribers.¹⁶⁵ The specific provision allowing carriers to recover some portion of their CALEA capital costs from their subscribers also reinforces our conclusion that carriers may not recover such costs from law enforcement through intercept charges. To the extent that carriers are not able to recover their CALEA capital costs from the federal government through section 109, Congress provided only one other avenue for carriers to recover such costs, and that is from subscribers, not law enforcement. Such recovery from consumers, of course, will vary among telecommunications carriers subject to CALEA depending on certain factors. Rate-regulated carriers (e.g., incumbent local exchange carriers) cannot raise rates without first obtaining authorization to do so. Other carriers (e.g., Commercial Mobile Radio Services (CMRS) providers) can recover their costs from subscribers on a competitive market basis.¹⁶⁶ Given this backdrop, in the *Notice*, we invited comment on whether a national surcharge scheme is feasible for carriers in their efforts to meet CALEA requirements.¹⁶⁷ We also sought comment on whether the Commission would need to undertake a specific forbearance analysis under section 10 of the Communications Act, and whether states may expressly provide for or preclude the recovery of CALEA compliance costs.¹⁶⁸

¹⁶³ While some commenters point to 18 U.S.C. § 2518(4) as support for the proposition that carriers may recover CALEA capital costs from law enforcement through intercept charges, *see, e.g.*, CTIA Comments at 28; Corr Comments at 10; Global Crossing Comments at 16; SBC Comments at 26; we disagree. Indeed, we believe that it is significant that when CALEA was passed, Congress provided specified cost recovery mechanisms for CALEA capital costs in CALEA section 109 and section 229 of the Communications Act but chose not to amend the portion of 18 U.S.C. § 2518(4) addressing intercept charges (even though Congress amended other provisions of Title III in CALEA). This strongly suggests that Congress did not intend for the additional compliance costs associated with CALEA to be recovered through intercept charges authorized by 18 U.S.C. § 2518(4) but rather by those mechanisms set forth in CALEA itself.

¹⁶⁴ *See supra* Section III.B.2 for a discussion of the criteria to be met by carriers seeking cost recovery pursuant to section 109(b)(1) of CALEA, 47 U.S.C. § 1008(b)(1).

¹⁶⁵ *See* 47 U.S.C. § 229(e) (authorizing common carriers to petition the Commission to adjust charges, practices, classifications, and regulations to recover costs expended for making modifications to equipment, facilities, or services pursuant to the requirements of section 103 of CALEA).

¹⁶⁶ *See* 47 U.S.C. § 332(c)(3) (preempting the states from any rate regulation of CMRS providers). *See Notice*, 19 FCC Rcd at 15738, para. 128. While some commenters expressed concern about the ability of small carriers in particular to recover a significant portion of their CALEA from subscribers, commenters uniformly agreed that carriers not subject to rate regulation are free to recover all or part of their CALEA costs by passing them on to their subscribers on a competitive market basis. *See, e.g.*, DOJ Comments at 85-87, Global Crossing Comments at 16, SBC Comments at 29.

¹⁶⁷ *Notice*, 19 FCC Rcd at 15738, para. 129.

¹⁶⁸ *Id.* at 15738, para. 130; 47 U.S.C. §§ 160, 332. Because we are not adopting cost recovery rules governing the recovery of CALEA costs from subscribers, we do not need to address whether analyses under sections 160 or 332 are warranted here.

73. We decline to adopt a national surcharge to recover CALEA costs. We find that it would not serve the public interest to use a national surcharge scheme or to implement some form of cost pooling system, as some commenters suggest,¹⁶⁹ because such a scheme would increase the administrative burden placed upon the carriers and provide little incentive for carriers to minimize their costs. We therefore decline to mandate a surcharge or other specific method of CALEA cost recovery. We find that carriers that are not subject to rate regulation may choose to recover their CALEA-related costs from their subscribers through any lawful manner consistent with their obligations under the Communications Act.¹⁷⁰ Section 229(e) of the Communications Act allows rate-regulated common carriers to seek to recover their federally-allocated CALEA section 103 costs from subscribers.¹⁷¹ As noted above, the Joint Board has not yet provided its recommendation as to the allocation of CALEA costs between the federal and state jurisdictions. After the Joint Board issues its recommendation, and to the extent that CALEA costs ultimately are allocated to the federal jurisdiction, rate-regulated carriers subject to the Commission's price cap rules have the ability to seek exogenous treatment of the federally-allocated CALEA costs.¹⁷² Carriers subject to the Commission's rate-of-return rules have the ability to propose rate changes that would seek recovery of any federally-allocated CALEA costs not already recovered in rates.¹⁷³

74. Commenters to the *Notice* also argue that carriers with smaller subscriber bases are less able to bear the costs of CALEA implementation.¹⁷⁴ To the extent CALEA costs prohibit these carriers from reasonably achieving CALEA compliance, CALEA section 109(b) provides a remedy.¹⁷⁵ The carriers can seek a determination from the Commission that CALEA compliance is not reasonably achievable, and, upon such a determination, the Attorney General may agree to pay the costs of compliance for these carriers, or the carriers will be deemed to be in compliance.¹⁷⁶

E. SYSTEM SECURITY REQUIREMENTS

75. In the *First R&O*, we concluded that providers of facilities-based broadband Internet access service and interconnected VoIP service newly identified as subject to CALEA under the SRP are to comply with the assistance capability requirements in section 103 of CALEA within 18 months of the

¹⁶⁹ See RCA Comments at 2; United Utilities Reply Comments at 7.

¹⁷⁰ We note that this approach is consistent with the recovery of other costs, including those for universal service and local number portability, incurred by carriers that are not subject to rate regulation. See *Truth-in-Billing and Billing Format*, CC Docket No. 98-170 and CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448, 6462, para. 28 (2005); *Telephone Number Portability*, CC Docket No. 95-116, Third Report and Order, 13 FCC Rcd 11701, 11774, para. 136 (1998).

¹⁷¹ 47 U.S.C. § 229(e).

¹⁷² 47 C.F.R. § 61.45(d).

¹⁷³ 47 C.F.R. §§ 61.38 and 61.39.

¹⁷⁴ RTG Comments at 7; United Utilities Reply Comments at 4.

¹⁷⁵ 47 U.S.C. § 1008(b).

¹⁷⁶ 47 U.S.C. § 1008(b)(2).

effective date of the *First R&O*.¹⁷⁷ In this *Second R&O*, we determine that these newly identified carriers must comply with the system security requirements in section 105 of CALEA and section 229(b) of the Communications Act, as codified in the Commission's rules,¹⁷⁸ within 90 days of the effective date of this *Second R&O*.¹⁷⁹

76. We find that, based on the record, 90 days is a reasonable time period to expect providers of facilities-based broadband Internet access service and interconnected VoIP service to comply with the Section 105 and 229(b) system security requirements, as codified in the Commission's rules.¹⁸⁰ Thus, we require these carriers to file with the Commission within 90 days of the effective date of this *Second R&O* the policies and procedures they use to comply with the system security requirements as codified in our rules. Ninety days is the same amount of time provided by the Commission when it initially adopted these requirements.¹⁸¹ Timely compliance with these requirements will assist LEAs and the Commission in identifying those entities now subject to CALEA, provide important contact information for Commission follow-up on CALEA compliance, and, more importantly for LEAs, ensure that providers of facilities-based broadband Internet access service and interconnected VoIP service are adequately prepared for assisting LEAs in conducting lawful electronic surveillance.

F. FUTURE SERVICES AND TECHNOLOGIES

77. In the *Notice*, the Commission tentatively concluded that it is unnecessary to adopt Law Enforcement's proposal regarding the Commission identifying future services and entities subject to CALEA.¹⁸² We recognized Law Enforcement's need for more certainty regarding the applicability of CALEA to new services and technologies, but expressed concern that Law Enforcement's proposed approach could be inconsistent with CALEA's statutory intent and could create an obstacle to innovation.¹⁸³ We noted that the requirements of the statute and its legislative history seem to support opponents' arguments that Congress did not intend that manufacturers or service providers would be required to obtain advance clearance from the government before deploying a technology or service that is not subject to CALEA. We also expressed concern that, as a practical matter, providers will be reluctant to develop and deploy innovative services and technologies if they must build in CALEA

¹⁷⁷ *First R&O*, 20 FCC Rcd at 14990, para. 3.

¹⁷⁸ The Commission adopted system security requirements for telecommunications carriers in 1999. *See also* 47 C.F.R. §§ 64.2100-64.2106. The Commission's rules provide guidance to carriers on policies and procedures for employee supervision and control, as well as maintaining secure and accurate records, when responding to an appropriate legal authorization for electronic surveillance. Each carrier is required to file with the Commission the current policies and procedures it uses to comply with these requirements, which are subject to Commission review and enforcement.

¹⁷⁹ Other carriers were subject to CALEA prior to the *First Report and Order* in this proceeding.

¹⁸⁰ Most commenters did not address compliance dates for system security requirements, although a few noted that complying with some of these obligations may be difficult for some small entities to meet and for those who have never assisted with an order for electronic surveillance; *e.g.*, *see* SIA Comments at 17-18. We note that trusted third parties and service bureaus can assist carriers in processing surveillance orders in accordance with the system security requirements, thereby ameliorating the burden for some carriers.

¹⁸¹ 47 C.F.R. § 64.2105.

¹⁸² *Notice*, 19 FCC Rcd at 15710, para. 60.

¹⁸³ *Id.* 19 FCC Rcd at 15710-11, paras. 60-61.

capabilities to equipment that ultimately may not be subject to CALEA or wait for a ruling on the statute's application to the new service or technology.¹⁸⁴

78. *Discussion.* In its comments to the *Notice*, DOJ argues that the Commission should adopt procedures to determine whether future services and entities are subject to CALEA. DOJ contends that it would be helpful for industry and LEAs to be able to seek rulings from the Commission regarding CALEA's applicability to a new service in advance of that service's introduction into the marketplace. DOJ concludes that the Commission should require or strongly encourage all providers of interstate wire or electronic communications services that have any question about whether they are subject to CALEA to seek Commission guidance at the earliest possible date, well before deployment of the service in question.¹⁸⁵

79. Other commenters support the tentative conclusion set forth in the *Notice*, contending that the public interest in innovation is not served by government design mandates imposed upon manufacturers and telecommunications carriers.¹⁸⁶ Verizon states that, while it supports the availability of an optional expedited declaratory ruling procedure for carriers that are unsure of their CALEA obligations, DOJ's proposed procedures and related requirements would effectively force carriers to obtain pre-authorization of new services and would contradict Congress's intent expressed in CALEA's legislative history, which makes clear that CALEA should be implemented in a way that does not impede the introduction of new technologies, features, and services.¹⁸⁷

80. We agree with Verizon and other commenters that it would be inconsistent with the legislative history of CALEA and inappropriate as a matter of policy for the Commission to identify future services and entities that may be subject to CALEA.¹⁸⁸ While we are sympathetic to DOJ's goal of establishing greater certainty regarding the applicability of CALEA to new services and technologies, we find that implementing DOJ's proposal would have a chilling effect on innovation. We believe that we can best determine the future services and entities that are subject to CALEA on a case-by-case basis. However, we concur with Verizon that an optional expedited declaratory ruling procedure for entities that are unsure of their CALEA obligations with regard to new services would be useful. Accordingly, telecommunications carriers and manufacturers, as well as LEAs, may petition the Commission for a declaratory ruling as to CALEA obligations with regard to new equipment, facilities and services.

G. CONSOLIDATION OF CALEA RULES

81. We are taking this opportunity to consolidate our CALEA rules into Part 1. Currently, those rules are contained in three different Parts of the Commission's rules: Part 22, titled "Public Mobile Services;" Part 24, titled "Personal Communications Services;" and Part 64, titled "Miscellaneous Rules Related to Common Carriers." CALEA rules for Parts 22 and 24 are each contained in a Subpart J, titled "Required New Capabilities Pursuant to the Communications Assistance

¹⁸⁴ *Id.* 19 FCC Rcd at 15711, para. 61.

¹⁸⁵ DOJ Comments at 36-38.

¹⁸⁶ EFF Reply Comments at 3; US ISPA Comments at 14-15.

¹⁸⁷ Verizon Reply Comments at 14.

¹⁸⁸ *But see* discussion at para. 32, *supra* (carriers should incorporate a CALEA compliance plan into new facilities deployments).

for Law Enforcement Act (CALEA).” Each respective Subpart sets forth the CALEA capabilities that must be provided by cellular and Personal Communications Services (PCS) telecommunications carriers. CALEA rules for Part 64 are contained both in Subpart V, titled “Telecommunication Carrier System Security and Integrity Pursuant to the Communications Assistance for Law Enforcement Act (CALEA);” and in Subpart W, titled “Required New Capabilities Pursuant to the Communications Assistance for Law Enforcement Act (CALEA).” Subpart V of Part 64 sets forth the CALEA systems security and integrity rules for all telecommunications carriers, while Subpart W of Part 64 sets forth the CALEA capabilities that must be provided by wireline telecommunications carriers.

82. Our current CALEA rules structure is somewhat confusing because capability requirements are contained in three different Parts, while systems security and integrity requirements are contained in only one Part. Further, the capability requirements for cellular, PCS, and wireline telecommunications carriers specified in different Parts are identical, with the only differences in language being the specific references to the three different types of carriers. Moreover, as discussed in paragraph 68, *supra*, we are herein codifying the statutory requirement that all carriers subject to CALEA must comply with the assistance capability requirements of section 103. While we could codify this requirement in Part 64, that Part pertains to “telecommunications carriers” under the Communications Act, rather than the broader application of that term under CALEA.¹⁸⁹ We therefore find it more logical to codify this requirement and consolidate our existing CALEA rules in Part 1, which is titled “Practice and Procedure,” and contains rules that apply more broadly to various services within the Commission’s jurisdiction. Accordingly, we are establishing new Subpart Z of Part 1, titling it “Communications Assistance for Law Enforcement Act,” and are deleting Part 22, Subpart J; Part 24, Subpart J; Part 64, Subpart V; and Part 64, Subpart W. Part 1, Subpart Z specifies that all carriers subject to CALEA must comply with both the assistance capability requirements of CALEA section 103 and the systems security and integrity requirements of CALEA section 105, and also lists the specific capability requirements pertaining to cellular, PCS, and wireline carriers that are currently set forth in Parts 22, 24, and 64. These rule changes are specified in Appendix B, *infra*.

H. MISCELLANEOUS

83. We recognize that certain questions raised by the outstanding *Further Notice of Proposed Rulemaking* in this docket remain unresolved.¹⁹⁰ We intend to address these matters expeditiously in a future order. In addition, we recognize that parties may also seek clarification of our rules and regulations. Our rules and precedent provide us with authority to issue such clarifications, amendments, suspensions, or waivers both in response to petitions or on our own motion.¹⁹¹

¹⁸⁹ *First R&O*, 20 FCC Rcd at 14993, para. 10.

¹⁹⁰ See, e.g., *Further Notice of Proposed Rulemaking*, 20 FCC Rcd at 15013, para. 49 & n. 142 (seeking comment “on the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers,” such as “small broadband access providers in rural areas,” and “private broadband networks used by schools, libraries, and research institutions.”)

¹⁹¹ See 47 C.F.R. §§ 1.2-3.

IV. PROCEDURAL ISSUES

1. *Ex Parte* Rules

84. This rulemaking shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.¹⁹² Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.¹⁹³ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

85. Documents in ET Docket No. 04-295 are available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St. SW, Room CY-A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

2. Accessible Formats

86. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0531 (voice), (202) 418-7365 (TTY).

3. Regulatory Flexibility Analysis

87. As required by the Regulatory Flexibility Act, see 5 U.S.C. § 603, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules addressed in the *Second R&O*. The FRFA is set forth in Appendix C.

4. Paperwork Reduction Analysis

88. *Final Paperwork Reduction Analysis.* The *Second R&O* contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding.

V. ORDERING CLAUSES

89. Accordingly, IT IS ORDERED that that pursuant to sections 1, 4(i), 7(a), 229, 301, 303, 332, and 410 of the Communications Act of 1934, as amended, and section 102 of the Communications Assistance for Law Enforcement Act, 18 U.S.C. § 1001, the *Second Report and Order and Memorandum Opinion and Order* in ET Docket No. 04-295 IS ADOPTED.

¹⁹² 47 C.F.R. §§ 1.200 *et seq.*

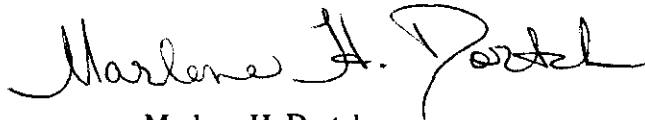
¹⁹³ 47 C.F.R. § 1.1206(b)(2).

90. IT IS FURTHER ORDERED that Parts 1, 22, 24, and 64 of the Commission's Rules, 47 C.F.R. Parts 1, 22, 24, and 64, are amended as set forth in Appendix B. The requirements of the *Second Report and Order* shall become effective 30 days after publication in the Federal Register. This *Second Report and Order* contains information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13, that are not effective until approved by the Office of Management and Budget. The Federal Communications Commission will publish a document in the Federal Register by the OMB announcing the effective date of those rules.

91. IT IS FURTHER ORDERED that the "Petition for Reconsideration and for Clarification of the *CALEA Applicability Order*" filed by the United States Telecom Association is granted to the extent indicated herein and is denied in all other respects.

92. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Second Report and Order and Memorandum Opinion and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "Marlene H. Dortch". The signature is fluid and cursive, with the first name "Marlene" and last name "Dortch" clearly legible. The middle initial "H." is smaller and less distinct.

Marlene H. Dortch
Secretary

APPENDIX A
LIST OF COMMENTERS

Comments to Notice in ET Docket No. 04-295:

Comments	Abbreviation
AMA TechTel Communications, LLC	AMA TechTel
American Civil Liberties Union	ACLU
BellSouth Corporation	BellSouth
Cellular Telecommunications & Internet Association	CTIA
Cingular Wireless LLC	Cingular
Coalition for Reasonable Rural Broadband CALEA Compliance	CRRBCC
Corr Wireless Communications, L.L.C	Corr
EarthLink, Inc.	EarthLink
EDUCAUSE Coalition	EDUCAUSE
Electronic Frontier Foundation	EFF
European Telecommunications Standards Institute	ETSI
Fiducianet, Inc.	Fiducianet
Global Crossing North America, Inc.	Global Crossing
GVNW Consulting, Inc.	GVNW
Industry and Public Interest Joint Commenters	I&P
Level 3 Communications, LLC	Level 3
MaineStreet Communications, Inc.	MaineStreet
Motorola, Inc.	Motorola
National Cable & Telecommunications Association	NCTA
National Telecommunications Cooperative Association	NTCA
New York Attorney General Eliot Spitzer	NYAG
Nextel Communications, Inc.	Nextel
Nuvio Corporation	Nuvio
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Rural Cellular Association	RCA
Rural Telecommunications Group, Inc.	RTG
Rural Telecommunications Providers	RTP
Satellite Industry Association	SIA
SBC Communications Inc.	SBC
Smithville Telephone Company	STC
Subsentio, Inc.	Subsentio
Telcom Consulting Associates, Inc.	TCA
Telecommunications Industry Association	TIA
T-Mobile USA, Inc.	T-Mobile
Texas Department of Public Safety	Texas DPS
United States Department of Justice	DOJ
United States Internet Service Provider Association	US ISPA
United States Telecom Association	USTelecom

VeriSign, Inc.	VeriSign
Verizon	Verizon
Vonage Holdings Corp.	Vonage
Yahoo! Inc.	Yahoo!

Reply Comments to Notice in ET Docket No. 04-295:

Replies	Abbreviation
BellSouth Corporation	BellSouth
Cellular Telecommunications & Internet Association	CTIA
EarthLink, Inc.	EarthLink
Electronic Frontier Foundation	EFF
Fiducianet, Inc.	Fiducianet
Global Crossing North America, Inc.	Global Crossing
Industry and Public Interest Joint Commenters	I&P
Level 3 Communications, LLC	Level 3
MetroPCS Communications, Inc.	MetroPCS
National Cable & Telecommunications Association	NCTA
National Telecommunications Cooperative Association	NTCA
Nextel Communications, Inc.	Nextel
Rural Iowa Independent Telephone Association	RIITA
Satellite Industry Association	SIA
SBC Communications Inc.	SBC
Southern LINC	Southern LINC
Sprint Corporation	Sprint
Telecommunications Industry Association	TIA
T-Mobile USA, Inc.	T-Mobile
United Power Line Council	UPLC
United States Cellular Corporation	USCC
United States Department of Justice	DOJ
United States Internet Service Provider Association	US ISPA
Office of Advocacy, United States Small Business Administration	Advocacy
United States Telecom Association	USTA
United Utilities, Inc., <i>et al.</i>	United Utilities
Verint Systems, Inc.	Verint
VeriSign, Inc.	VeriSign
Verizon	Verizon
Vonage Holdings Corp.	Vonage

Comments/Oppositions to United States Telecom Association's Petition for Reconsideration and Clarification in ET Docket No. 04-295

<u>Oppositions and Comments</u>	<u>Abbreviation</u>
8x8, Inc., Acorn Active Media, American Library Association, Association for Community Networking, Association of College and Research Libraries, Association of Research Libraries, Center for Democracy & Technology, Champaign Urbana Community Wireless Network, Electronic Frontier Foundation, Information Technology Association of America, Texas Internet Service Providers Association, Voice on the Net (VON) Coalition	8x8
American Civil Liberties Union	ACLU
CTIA – The Wireless Association	CTIA
Global Crossing North America, Inc.	Global Crossing
National Telecommunications Cooperative Association and the Organization for the Promotion and Advancement of Small Telecommunications Companies	NTCA/OPASTCO
Satellite Industry Association	SIA
Telecommunications Industry Association	TIA
United States Department of Justice	DOJ
VeriSign, Inc.	VeriSign

Replies to Comments/Oppositions to United States Telecom Association's Petition for Reconsideration and Clarification in ET Docket No. 04-295

<u>Replies</u>	<u>Abbreviation</u>
American Library Association, Association of Research Libraries, Association of College and Research Libraries	ALA
United States Telecom Association	USTelecom
Computer & Communications Industry Association, Information Technology Association of America, Acorn Active Media, Association for Community Networking, Center for Democracy & Technology, Center for Financial Privacy and Human Rights, Champaign Urbana Community Wireless Network, Electronic Frontier Foundation, Texas Internet Service Providers Association	CCIA
Information Technology Industry Council	ITI
United Power Line Council	UPLC
US LEC Acquisition Co.	US LEC
VeriSign, Inc.	VeriSign

APPENDIX B FINAL RULES

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Parts 1, 22, 24, and 64 as follows:

A. Part 1 of the Code of Federal Regulations is amended as follows:

PART 1- PRACTICE AND PROCEDURE

1. The authority for Part 1 continues to read as follows:

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, and 303(r).

2. Subpart Z is added to read as follows:

Subpart Z – Communications Assistance for Law Enforcement Act

1.20000 Purpose.

1.20001 Scope.

1.20002 Definitions.

1.20003 Policies and procedures for employee supervision and control.

1.20004 Maintaining secure and accurate records.

1.20005 Submission of policies and procedures and Commission review.

1.20006 Assistance capability requirements.

1.20007 Additional assistance capability requirements for wireline, cellular, and PCS telecommunications carriers.

§ 1.20000 Purpose.

Pursuant to the Communications Assistance for Law Enforcement Act (CALEA), Public Law 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.), this subpart contains rules that require a telecommunications carrier to:

(a) ensure that any interception of communications or access to call-identifying information effected within its switching premises can be activated only in accordance with appropriate legal authorization, appropriate carrier authorization, and with the affirmative intervention of an individual officer or employee of the carrier acting in accordance with regulations prescribed by the Commission; and

(b) implement the assistance capability requirements of CALEA section 103, 47 U.S.C. § 1002, to ensure law enforcement access to authorized wire and electronic communications or call-identifying information.

§ 1.20001 Scope.

The definitions included in this subchapter shall be used solely for the purpose of implementing CALEA requirements.

§ 1.20002 Definitions.

(a) *Appropriate legal authorization.* The term *appropriate legal authorization* means:

(1) A court order signed by a judge or magistrate authorizing or approving interception of wire or electronic communications; or

(2) Other authorization, pursuant to 18 U.S.C. 2518(7), or any other relevant federal or state statute.

(b) *Appropriate carrier authorization.* The term *appropriate carrier authorization* means the policies and procedures adopted by telecommunications carriers to supervise and control officers and employees authorized to assist law enforcement in conducting any interception of communications or access to call-identifying information.

(c) *Appropriate authorization.* The term *appropriate authorization* means both appropriate legal authorization and appropriate carrier authorization.

(d) *LEA.* The term *LEA* means law enforcement agency; e.g., the Federal Bureau of Investigation or a local police department.

(e) *Telecommunications carrier.* The term *telecommunications carrier* includes:

(1) A person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire;

(2) A person or entity engaged in providing commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d))); or

(3) A person or entity that the Commission has found is engaged in providing wire or electronic communication switching or transmission service such that the service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of CALEA.

§ 1.20003 Policies and procedures for employee supervision and control.

A telecommunications carrier shall:

(a) Appoint a senior officer or employee responsible for ensuring that any interception of communications or access to call-identifying information effected within its switching premises can be activated only in accordance with a court order or other lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier.

(b) Establish policies and procedures to implement paragraph (a) of this section, to include:

(1) A statement that carrier personnel must receive appropriate legal authorization and appropriate carrier authorization before enabling law enforcement officials and carrier personnel to implement the interception of communications or access to call-identifying information;

(2) An interpretation of the phrase "appropriate authorization" that encompasses the definitions of appropriate legal authorization and appropriate carrier authorization, as used in paragraph (b)(1) of this section;

(3) A detailed description of how long it will maintain its records of each interception of communications or access to call-identifying information pursuant to § 1.20004;

(4) In a separate appendix to the policies and procedures document:

(i) The name and a description of the job function of the senior officer or employee appointed pursuant to paragraph (a) of this section; and

(ii) Information necessary for law enforcement agencies to contact the senior officer or employee appointed pursuant to paragraph (a) of this section or other CALEA points of contact on a seven days a week, 24 hours a day basis.

(c) Report to the affected law enforcement agencies, within a reasonable time upon discovery:

(1) Any act of compromise of a lawful interception of communications or access to call-identifying information to unauthorized persons or entities; and

(2) Any act of unlawful electronic surveillance that occurred on its premises.

§ 1.20004 Maintaining secure and accurate records.

(a) A telecommunications carrier shall maintain a secure and accurate record of each interception of communications or access to call-identifying information, made with or without appropriate authorization, in the form of single certification.

- (1) This certification must include, at a minimum, the following information:
- (i) The telephone number(s) and/or circuit identification numbers involved;
 - (ii) The start date and time that the carrier enables the interception of communications or access to call identifying information;
 - (iii) The identity of the law enforcement officer presenting the authorization;
 - (iv) The name of the person signing the appropriate legal authorization;
 - (v) The type of interception of communications or access to call-identifying information (e.g., pen register, trap and trace, Title III, FISA); and
 - (vi) The name of the telecommunications carriers' personnel who is responsible for overseeing the interception of communication or access to call-identifying information and who is acting in accordance with the carriers' policies established under § 1.20003.
- (2) This certification must be signed by the individual who is responsible for overseeing the interception of communications or access to call-identifying information and who is acting in accordance with the telecommunications carrier's policies established under § 1.20003. This individual will, by his/her signature, certify that the record is complete and accurate.
- (3) This certification must be compiled either contemporaneously with, or within a reasonable period of time after the initiation of the interception of the communications or access to call-identifying information.
- (4) A telecommunications carrier may satisfy the obligations of paragraph (a) of this section by requiring the individual who is responsible for overseeing the interception of communication or access to call-identifying information and who is acting in accordance with the carriers' policies established under § 1.20003 to sign the certification and append the appropriate legal authorization and any extensions that have been granted. This form of certification must at a minimum include all of the information listed in paragraph (a) of this section.
- (b) A telecommunications carrier shall maintain the secure and accurate records set forth in paragraph (a) for a reasonable period of time as determined by the carrier.
- (c) It is the telecommunications carrier's responsibility to ensure its records are complete and accurate.
- (d) Violation of this rule is subject to the penalties of § 1.20008.

§ 1.20005 Submission of policies and procedures and Commission review.

- (a) Each telecommunications carrier shall file with the Commission the policies and procedures it uses to comply with the requirements of this subchapter. These policies and procedures shall be filed with the Federal Communications Commission within 90 days of the effective date of these rules, and thereafter, within 90 days of a carrier's merger or divestiture or a carrier's amendment of its existing policies and procedures.
- (b) The Commission shall review each telecommunications carrier's policies and procedures to determine whether they comply with the requirements of § 1.20003 and § 1.20004.
- (1) If, upon review, the Commission determines that a telecommunications carrier's policies and procedures do not comply with the requirements established under § 1.20003 and § 1.20004, the telecommunications carrier shall modify its policies and procedures in accordance with an order released by the Commission.
- (2) The Commission shall review and order modification of a telecommunications carrier's policies and procedures as may be necessary to insure compliance by telecommunications carriers with the requirements of the regulations prescribed under § 1.20003 and § 1.20004.

§ 1.20006 Assistance capability requirements.

- (a) Telecommunications carriers shall provide to a Law Enforcement Agency the assistance capability requirements of CALEA regarding wire and electronic communications and call identifying information, see 47 U.S.C. 1002. A carrier may satisfy these requirements by complying with publicly available

technical requirements or standards adopted by an industry association or standard-setting organization, such as J-STD-025 (current version), or by the Commission.

(b) Telecommunications carriers shall consult, as necessary, in a timely fashion with manufacturers of its telecommunications transmission and switching equipment and its providers of telecommunications support services for the purpose of ensuring that current and planned equipment, facilities, and services comply with the assistance capability requirements of 47 U.S.C. 1002.

(c) A manufacturer of telecommunications transmission or switching equipment and a provider of telecommunications support service shall, on a reasonably timely basis and at a reasonable charge, make available to the telecommunications carriers using its equipment, facilities, or services such features or modifications as are necessary to permit such carriers to comply with the assistance capability requirements of 47 U.S.C. 1002.

§1.20007 Additional assistance capability requirements for wireline, cellular, and PCS telecommunications carriers.

(a) Definitions.

(1) *Call identifying information.* Call identifying information means dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier. Call identifying information is "reasonably available" to a carrier if it is present at an intercept access point and can be made available without the carrier being unduly burdened with network modifications.

(2) *Collection function.* The location where lawfully authorized intercepted communications and call-identifying information is collected by a law enforcement agency (LEA).

(3) *Content of subject-initiated conference calls.* Capability that permits a LEA to monitor the content of conversations by all parties connected via a conference call when the facilities under surveillance maintain a circuit connection to the call.

(4) *Destination.* A party or place to which a call is being made (e.g., the called party).

(5) *Dialed digit extraction.* Capability that permits a LEA to receive on the call data channel a digits dialed by a subject after a call is connected to another carrier's service for processing and routing.

(6) *Direction.* A party or place to which a call is re-directed or the party or place from which it came, either incoming or outgoing (e.g., a redirected-to party or redirected-from party).

(7) *IAP.* Intercept access point is a point within a carrier's system where some of the communications or call-identifying information of an intercept subject's equipment, facilities, and services are accessed.

(8) *In-band and out-of-band signaling.* Capability that permits a LEA to be informed when a network message that provides call identifying information (e.g., ringing, busy, call waiting signal, message light) is generated or sent by the IAP switch to a subject using the facilities under surveillance. Excludes signals generated by customer premises equipment when no network signal is generated.

(9) *J-STD-025.* The standard, including the latest version, developed by the Telecommunications Industry Association (TIA) and the Alliance for Telecommunications Industry Solutions (ATIS) for wireline, cellular, and broadband PCS carriers. This standard defines services and features to support lawfully authorized electronic surveillance, and specifies interfaces necessary to deliver intercepted communications and call-identifying information to a LEA. Subsequently, TIA and ATIS published J-STD-025-A and J-STD-025-B.

(10) *Origin.* A party initiating a call (e.g., a calling party), or a place from which a call is initiated.

(11) *Party hold, join, drop on conference calls.* Capability that permits a LEA to identify the parties to a conference call conversation at all times.

(12) *Subject-initiated dialing and signaling information.* Capability that permits a LEA to be informed when a subject using the facilities under surveillance uses services that provide call identifying information, such as call forwarding, call waiting, call hold, and three-way calling. Excludes signals generated by customer premises equipment when no network signal is generated.

(13) *Termination.* A party or place at the end of a communication path (e.g. the called or call-receiving party, or the switch of a party that has placed another party on hold).

(14) *Timing information.* Capability that permits a LEA to associate call-identifying information with the content of a call. A call-identifying message must be sent from the carrier's IAP to the LEA's Collection Function within eight seconds of receipt of that message by the IAP at least 95% of the time, and with the call event time-stamped to an accuracy of at least 200 milliseconds.

(b) In addition to the requirements in section 1.20006, wireline, cellular, and PCS telecommunications carriers shall provide to a LEA the assistance capability requirements regarding wire and electronic communications and call identifying information covered by J-STD-025 (current version), and, subject to the definitions in this section, may satisfy these requirements by complying with J-STD-025 (current version), or by another means of their own choosing. These carriers also shall provide to a LEA the following capabilities:

- (1) Content of subject-initiated conference calls;
- (2) Party hold, join, drop on conference calls;
- (3) Subject-initiated dialing and signaling information;
- (4) In-band and out-of-band signaling;
- (5) Timing information;
- (6) Dialed digit extraction, with a toggle feature that can activate/deactivate this capability.

§ 1.20008 Penalties.

In the event of a telecommunications carrier's violation of this subchapter, the Commission shall enforce the penalties articulated in 47 U.S.C. 503(b) of the Communications Act of 1934 and 47 CFR 1.8.

PART 22- PUBLIC MOBILE SERVICES

1. The authority for Part 22 continues to read as follows:

Authority: 47 U.S.C. 154, 222, 303, 309, and 332.

2. Part 22, Subpart J, is amended by removing Sections 22.1100-22.1103.

PART 24- PERSONAL COMMUNICATIONS SERVICES

1. The authority for Part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309, and 332.

2. Part 24, Subpart J, is amended by removing Sections 24.900- 24.903.

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority for Part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(K); secs. 403(b)(2)(B), (c), Pub. L. 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 228, and 254(k) unless otherwise noted.

2. Part 64, Subparts V and W, are amended by removing Sections 64.2100-64.2106 and 64.2200-2203.

APPENDIX C REGULATORY FLEXIBILITY ANALYSIS

I. FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking (Notice)* in this proceeding.² The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA.³ The comments received are discussed below, except to the extent that they were previously addressed in the Final Regulatory Flexibility Analysis (FRFA) attached to the *First Report and Order (First R&O)* in this proceeding.⁴ The current FRFA, which conforms to the RFA,⁵ pertains only to the *Second Report and Order (Second R&O)* in this proceeding. The companion *Memorandum Opinion and Order (MO&O)* does not adopt rules, but rather, *inter alia*, denies a petition to change a Commission rule.

A. Need for, and Objectives of, the Rules

2. Advances in technology, most notably the introduction of digital transmission and processing techniques, and the proliferation of Internet services such as broadband access and Voice over Internet Protocol (VoIP), have challenged the ability of law enforcement agencies (LEAs) to conduct lawful electronic surveillance. In light of these difficulties and other outstanding issues associated with the implementation of the 1994 Communications Assistance for Law Enforcement Act (CALEA), the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration filed a joint petition for expedited rulemaking in March 2004, asking the Commission to address and resolve these issues. The *First R&O* concluded that CALEA applies to facilities-based broadband Internet access providers and providers of interconnected VoIP service, and established a compliance deadline of May 14, 2007 for these providers.⁶

3. In the *Second R&O*, we require that facilities-based broadband Internet access providers and providers of interconnected VoIP submit monitoring reports to ensure their CALEA compliance by the May 14, 2007 deadline established by the *First R&O*. More generally, we require that telecommunications carriers comply with CALEA by finding that sections 107(c) and 109(b) of CALEA provide only limited and temporary relief from compliance requirements, and by finding that extension of the compliance deadline for capabilities required by CALEA section 103 is available only for facilities and services deployed prior to October 25, 1998 under the express terms of the statute. We also conclude that, in addition to the enforcement remedies through the courts available to LEAs under CALEA section 108, we may take separate enforcement action under section 229(a) of the Communications Act against carriers that

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676, 15751-60, App. B (2004) (*Notice*).

³ *Id.*

⁴ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295, RM-10865, 20 FCC Rcd 14989, 15021-15036, App. C (2005) (*First R&O*).

⁵ See 5 U.S.C. § 604. Comments on small business issues that were raised in response to the *Notice*, rather than to the IRFA itself, are also referenced herein.

⁶ *First R&O*, 20 FCC Rcd at 14989-14990, paras. 1-3.

fail to comply with CALEA. Moreover, we conclude that carriers must generally pay for CALEA development and implementation costs incurred after January 1, 1995 (unless their costs are reimbursed in response to a CALEA section 109(b) petition), but we acknowledge that they may recover costs from other sources, such as from their subscribers.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

4. In this section, we respond to commenters who filed directly in response to the IRFA. To the extent we received comments raising general small business concerns during this proceeding, those comments are discussed throughout the *Second R&O*.⁷

5. The National Telecommunications Cooperative Association (NTCA) and the Office of Advocacy, U.S. Small Business Administration (Advocacy) filed comments directly in response to the IRFA. NTCA and Advocacy both generally contend that the RFA requires that the Commission consider less burdensome alternatives appropriate to the size of the covered entities.⁸ These comments were partially addressed in our previous *First R&O* in this proceeding;⁹ therefore, in this IRFA, we respond only to those arguments that are relevant to the *Second R&O*. In particular, we respond to NTCA's argument¹⁰ that we failed to include the availability of CALEA section 107(c) extension petitions as part of the IRFA and to Advocacy's arguments¹¹ that the IRFA did not discuss all the alternatives available to small entities, including petitions for extensions under CALEA sections 107(c) and 109(b) and use of trusted third parties (TTPs).

6. We reject NTCA's and Advocacy's arguments that the Commission failed to adequately consider these issues. While we recognize that we did not specifically list them in the IRFA, the IRFA combined with the *Notice* appropriately identified the ways in which the Commission could lessen the regulatory burdens on small businesses in compliance with our RFA obligations. First, we generally discussed in the *Notice* the possibility of an exemption from CALEA compliance for small businesses that provide wireless broadband Internet access to rural areas.¹² Second, with regard to CALEA sections 107(c) and 109(b) compliance extension petitions, we devoted an entire section of the *Notice*, spanning 24 paragraphs, to these issues.¹³ Although we proposed to restrict the availability of compliance extensions under section 107(c)¹⁴ and noted that there is a significant burden on section 109(b) petitioners,¹⁵ we thoroughly considered the potential impact of those proposals on small businesses, but concluded that it would be inconsistent with the CALEA statute to make exceptions for small businesses with respect to section 107(c) and section 109(b) petitions. Third, with respect to TTPs, we devoted a subsection of the *Notice*, spanning eight paragraphs, to that issue. We noted therein that there may be some tension between relying on a TTP model and "safe harbor" standards, but that TTPs had the potential to simplify or ease the burden on carriers and manufacturers in providing packet content and call-identifying information to

⁷ See *Second R&O*, paras. 16, 26, 36, 56, and 78.

⁸ NTCA Reply Comments at 3; Advocacy Reply Comments at 1-4.

⁹ *First R&O* at 20 FCC Rcd 15022-23, App. C.

¹⁰ NTCA Comments at 7.

¹¹ Advocacy Reply Comments at 7-8.

¹² See *Notice*, 19 FCC Rcd at 15704-05, para 49.

¹³ *Id.* 19 FCC Rcd at 15720-30, paras. 87-110.

¹⁴ *Id.* 19 FCC Rcd at 15720, para. 87.

¹⁵ *Id.* 19 FCC Rcd at 15728-29, paras. 104-06.